Supreme Court of the United States.

OCTOBER TERM, 1899.

NO. 164.

J. W. CUMMING, JAMES S. HARPER, AND JOHN C. LADEVEZE, Plaintiffs in Error.

vs.

THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, STATE OF GEORGIA, Defendant in Error.

Brief of FRANK H. MILLER for Defendant in Error.

STATEMENT OF THE CASE.

Plaintiffs in error, persons of color and parents of children of school age, filed a verified petition in equity in Richmond Superior Court against the Board of Education and Tax Collector, to enjoin the collection of the tax levied by the Board of Education July 10th, 1897, pursuant to the act to regulate public instruction in the County of Richmond, approved August 23rd, 1872, P. L. 456. This petition alleged that the Board had established a *system of primary schools, a system of intermediate schools, a system of grammar schools, and a system of high schools in the County.* That ten per cent. of the tax assessed would be used by the Board for the support of the system of high schools. That this was illegal, because the Board, after having organized and maintained up to the time of the tax levy and for many years prior thereto, a system of high schools, where the colored school population had the same educational advantages as the white school population, on July 10, 1897, withdrew and denied to the colored school population any admission to or participation in the educational facilities of the high school *system*, and has voted to continue to deny to them any admission to or participation in these educational advantages. Pleading and relying on so much of the supreme law of the land, to-wit: *the Constitution of the United States* as declares that no state shall deny to any person within its jurisdiction the *equal protection of the laws*, they averred that the said action of the Board *was a denial of the equal protection of the laws*, and such as is forbidden by the said Constitution.

The petitioners prayed an injunction against the tax collector from collecting so much of the tax as had been levied for the support of the

system of high schools, and against the Board of Education from using *any funds or property for educational purposes* in said county for the support, maintenance or operation of said *system of high schools*. An interlocutory rule was issued to show cause why the relief prayed for in the petition should not be granted, and hearing was had thereunder.

The tax collector demurred, among other grounds, because plaintiffs made no such case as would authorize judicial interference by injunction with the system of taxation established by the Board of Education pursuant to the law of its creation said Act of Aug. 23, 1872.

The Board demurred for want of equity. It answered, admitting it had established the Ware High School for colored people but had discontinued it *temporarily* because 400 negro children were turned away from the primary grade unable to be provided with seats or teachers, and the same means and the same building which was used to teach *sixty* high school pupils would accommodate 200 pupils in the rudiments of an education, and because the Board at that time *was not financially able to erect buildings and employ additional teachers for the large number of colored children who were in need of primary education.* That there was at that time in the City of Augusta three public high schools which were public to the colored people and were charging fees no larger than had been charged by the board for pupilage in the Ware High School. That with these means and buildings the Board had established three primary schools for colored children, which were organized, established, and in operation when the petitioners filed their bill. The Board denied the allegation that the said Act of 1872 denied to the colored race equal protection of the law, or that the course and conduct of the Board thereunder was obnoxious to this constitutional limitation.

The Board admitted in its answer that under a petition for re hearing, when representatives of the colored race were present representing the interests of the primary schools, and the high schools, it had adhered to its former decision, but had resolved *to reinstate the Ware High School whenever the Board could afford it.* That the effort of the Board was to give more of the blacks an education in the elementary branches of an English education, and if there was any discrimination it was in favor of the little negro as against his more advanced brother.

As to the disposition of the fund when collected, they say, Record 15, "The school fund at the disposal of the board is annually divided according to the school population among the city wards, the five country districts, and the two villages, after reserving a fund for the general expenses of the board and for the high schools. By this means each set of local trustees can see the amount at their disposal and can regulate their schools accordingly. They can have few or many teachers, a long or a short term, build and repair just as they please and as their funds permit.

"Each district, village, and the city wards run a separate set of schools, and yet the whole system is controlled by one Board of Education, and the actions of the various local trustees are under the supervision of suitable committees from the general board. The secretary and county school commissioner is in general charge of the whole. The teachers in the high schools are chosen by the conference board of

the city trustees, which consists of the 15 members from the 5 wards. Those in the country districts are chosen by the local trustees in which the district is situated." The Court below, Printed Record 35, held the Act of '72 creating the Board of Education of Richmond County, vested in that board large discretionary powers, and the exercise of these discretionary powers are in most instances not subject to control, revision or alteration of any court or any other governmental agency; but found it had no power, discretion, or authority save those given by the Act of the legislature creating the board and the acts amendatory thereof—and every exercise of discretion or power by the board, whether it be characterized as legislative, judicial, or executive, must be exercised within the limits of the authority delegated by the legislature. The Court then, construing the ninth and tenth section of the Act of '72, held that the discretion authorized to be exercised by section ten, was controlled by the provisions of section nine, and that the board must provide the same facilities for higher education for both races; stating that this construction placed upon the Act of '72 is not violative of the provisions of the constitution of 1868 nor of the fourteenth amendment of the Constitution of the United States, *but, if the construction contended for by the defendants is placed upon the act, it would in his opinion be repugnant to both*: He thereupon sustained as cause under the rule, Record 38, the demurrer of the tax-collector and overruled the demurrer of the board, granting the second prayer of the plaintiff's petition, Printed Record 4, to-wit, "That said board be enjoined from using any funds or property now in or hereafter coming into its hands for educational purposes in said county for the support, maintenance, or operation of said system of high schools."

The Court below in passing thereon, Printed Record 37, found it immaterial, to determine the right to charge tuition, because not sufficiently raised, and because counsel for plaintiff in his argument stated that he did not desire the Court to consider the question otherwise than in its bearing upon the right of the colored race to have equal high school facilities as the white children.

To this decision the Board of Education excepted and made parties to the writ of error the plaintiffs and the tax-collector. The judgment of the Court below was reversed, Printed Record 53, wherein the Court say, page 57.

"It is claimed that this action is in violation of the 14th amendment to the Constitution of the United States. This point in the case was not argued before us by the learned counsel for the defendant in error, either *orrally or by brief*, the only mention made of it in his brief being at the conclusion, where he says: To deny the colored school population of Richmond county, the equal protection of the educational laws of force in that county is to violate not only the State law, but the Constitution of the United States, fourteenth amendment. He cites no authority to sustain this contention. He does not point out in his brief which paragraph of the fourteenth amendment is violated. If it be the first, he does not point out what clause of that paragraph is violated, whether the privileges or immunities of citizens of the United States are abridged, whether his clients are deprived of life, liberty, or property without due process of law, or whether his clients are denied

the equal protection of the laws. It is difficult, therefore, for us to determine whether this amendment has been violated. If any authority had been cited, we could from that have determined which paragraph or clause counsel relied upon, but as he has left us in the dark we can only say that in our opinion none of the clauses of any of the paragraphs of the amendment, under the facts disclosed by the record, is violated by the board."

The mandate of the Supreme Court was made the judgment of the Court below and plaintiffs were then refused all relief. Record 39 *by a dismissal of their petition.*

CHRONOLOGICAL STATEMENT OF CONSTITUTIONS AND STATUTES CITED.

The people of Georgia, in convention assembled, March 11th, 1868, adopted a Constitution.

By proclamation from the President of the United States, July 27th, 1868, it was made known that the State of Georgia, through its legislature, had on July 21st, 1868, ratified the 14th Article of the Constitution of the United States.

Thereafter, the Act of Congress relating to the State of Georgia, approved July 15th, 1870, was passed, which enacted—That the State, having complied with the reconstruction acts and ratified the 14th and 15th Articles of Amendment to the Constitution of the United States, was entitled to representation in the Congress of the United States.

Article VI of this Constitution, Code 1873, Sec. 5132 and 5134, ordains as follows:

"SEC. 1. The General Assembly, at its first session after the adoption of this Constitution, shall provide a thorough system of *general education* to be forever free to all children of the state, the expense of which shall be provided for by taxation, or otherwise.

"SEC. 3. The poll tax allowed by this Constitution, any educational fund now belonging to this state—except the endowment of, and debt due to the State University—or that may hereafter be obtained in any way, a special tax on shows and exhibitions, and on the sale of spirituous and malt liquors—which the General Assembly is hereby authorized to assess—and the proceeds from the commutation for militia service, are hereby set apart and devoted to the support of common schools. And if the provision herein made shall at any time prove insufficient, the General Assembly shall have power to levy such general tax upon the property of the state as may be necessary for the support of said school system. And there shall be established, as soon as practicable, one or more *common schools* in each school district in this state."

Thereafter, by Act of October 13th, 1870, (Public Laws 49) there was established a system of public instruction, which was repealed by Act approved August 23rd, 1872, (Public Laws 64), to perfect the public school system and to supersede existing school laws.

There was also approved August 23, 1872, P. L. 456, an Act to regulate public instruction in the County of Richmond, the material portions of which are as follows:

"SEC 9. And be it further enacted, That the County Board of "Education, *under the advice and assistance of the trustees in each "ward or school district*, shall make all necessary arrangements for "the instruction of the white and colored youth in separate schools; "they shall provide the same facilities for each, both as regards

"school-houses and fixtures, attainments and abilities of teachers, "length of term time, and all other matters appertaining to educa- "tion, but in no case shall white and colored children be taught to- "gether in the same school."

"SEC. 10. And be it further enacted, That the County Board of "Education may establish schools of *higher grade*, at such points "in the county as the interests and convenience of the people may "require, which school shall be under the *special management of "the board at large*, who shall have full power, in respect to such "schools, to employ, pay, and dismiss teachers, to build, repair and "furnish the school-house or houses, purchase or lease sites therefor "or rent suitable rooms, and make all other necessary provisions "relative to such schools as they may deem proper; the funds for "such purpose shall be deducted ratably from the quota apportioned "to the respective school districts."

"SEC. 16. And be it further enacted, That at their first meeting in "January of each year, or as soon thereafter as practicable, the "county board, by a two-thirds vote of all its members, shall levy "such tax as they may deem necessary for public school purposes; "it shall be the duty of the County Commissioner to make out an "assessment and return of such tax against all the legal tax-payers "in the county, and furnish a copy of said assessment and return to "the County Tax Collector, whose duty it shall be to collect the said "tax, and deposit it to the credit of the county board, in such bank "in the city of Augusta as may be designated by the State Com- "missioner for the deposit of the county school fund."

SEC. 19. And be it further enacted, That admissions to all the "*public schools*, of the county shall be *gratuitous* to minors, between "the ages of six and eighteen years, who are the children, wards or "apprentices of actual residents in Richmond county: Provided, "That the county board shall have power to admit to such public "schools other pupils, upon such terms, or the payment of such tui- "tion, as the Board may prescribe."

"SEC. 20. And be it further enacted, That no general law upon "the subject of education, now in force in this State, or hereafter to "be enacted by its General Assembly, shall be construed as to inter- "fere with, diminish or supersede the rights, powers and privileges "conferred upon the Board of Education of Richmond county by "this Act, unless it shall be so expressly provided by designating "the said county and board under their respective names."

Subsequently a new Constitution went into operation, December 21, 1877, Civil Code of '95 p. 1783, which ordained, Article 8, Section 1, Paragraph 1, Code 5906: There shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation or otherwise. The Schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races.

SEC. 5, Paragraph 1, Code 5910: Existing local school systems shall not be affected by this Constitution. Nothing contained in the first section of this article shall be construed to deprive schools in this state, not common schools, from participating in the educational fund of the state as to all pupils therein taught in the elementary branches of an English education.

By Act approved February 22, 1877, P. L. 347, Section 10 of the Act approved August 23, 1872, was amended to read as follows:

"And be it further enacted, That the County Board of Education "may establish schools of higher grade at such points in the county

"as the interest and convenience of the people may require, which "schools shall be under the special management of the Board at "large, who shall have full power in respect to such schools to em- "ploy, pay and dismiss teachers, to build, repair and furnish the "school-house or houses, purchase or lease sites therefor, or rent "suitable rooms, and make all other necessary provisions relative to "such schools as they may deem proper. The funds for such pur- "pose shall be deducted ratably from the quota apportioned to the "respective school districts, and the *County Board of Education* "*shall have full power and authority to charge such sums for tuition,* "*and incidental expenses, in said schools of higher grade, as the* "*Board from time to time, may fix and determine.*"

This Act was held Constitutional by the Supreme Court of the State in *Smith et al. vs. Bohler*, 72 Ga., 546, and affirmed in *Montgomery-Executor vs. The County Board of Education of Richmond County et al.*, 74 Ga., 41.

BRIEF OF THE ARGUMENT.

POINTS OF LAW.

THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THIS WRIT OF ERROR.

(a). There is a want of proper Parties. One prayer in the original petition, and reaffirmed in the amended petition, Printed Record 4 and 21, was that the Tax Collector be enjoined from collecting so much of the tax levy of July 10th 1897, as had been levied for the support by said board in said county of said systemof high schools.

The Tax Collector, at the hearing of the rule against him, demurred and plead, as to any such procedure, against him, "res adjudicata", citing 72 Ga. Reports, page 546.

The Court below, Printed Record 38, sustained the demurrer and refused the prayer of the plaintiffs petition, but the petition was not dismissed as to him until after the decision of the Supreme Court, page 38, P. R. when all relief was refused.

The Tax Collector being a party to the original petition and the writ of error to the Supreme Court of Georgia and duly served, Supplemental Record, page 2, he should have been a party to this writ of error to be bound thereby.

The procedure was to enjoin the collection by the Tax Collector of taxes assessed and to be collected for 1897. No other year was at issue or involved in the procedure. Since the rendition of the decision dismissing the bill, all these taxes have been in conformity to law paid out and disbursed. The Tax Collector not being a party before this Court there is no way to make the judgment of the Court applicable to him or reach the taxes assessed.

(b) The final decree of Richmond Superior Court, Record 39, Par. 2, was that the plaintiffs in the cause, "be and they are hereby refused all the relief prayed for," and the petition be dismissed at their costs. The final decision on the merits specifies no particular ground. Therefore it does not affirmatively appear that a Federal question was presented, and that the judgment as rendered could not have been given without deciding it, which is necessary.

Harrison vs. Morton, 171 U. S., 38.

(c) It was an application to a Court of Equity to restrain by injunction the exercise by the respective trustees comprising the Board, of the privileges of their office, which is prohibited.

White vs. Berry, 171 U. S., 366.

(d) It really rested upon grounds other than those dependent upon a Federal question, and is not reviewable, although a Federal question was originally sought to be raised in the State Court.

Chappell Chemical & Fertilizer Co. vs. Sulphur Mines Co. of Virginia, 172 U. S., 474. 101 U. S. 22; 120 U. S. 68.

To the same effect see McQuade vs. inhabitants of the City of Trenton, 172 U. S., 636, in which the Court cites in support of it, 142 U. S., 254; 113 U. S., 574; 116 U. S., 410; 171 U. S., 38, and 163 U. S., 207.

(e) Regulation by a Board of Education of schools of higher grade than free schools abridges no privileges or immunity of a citizen of the United States or denies him the equal protection of the laws.

Slaughterhouse cases, 16 Wal., 81.

FIRST ASSIGNMENT OF ERROR, PRINTED RECORD 40.

The language of the statute of Georgia referred to, acts of '72, P. L., 460, is, *May establish schools of higher grade at such points in the County as the interest amd convenience of the people may require—and may make all other necessary provisions relating to such schools as they may deem proper.*

This Act is now assigned as contrary to the Constitution, especially the 14th amendment, in that it gives a *discretion* to the Board to establish and maintain, and to discontinue and refuse to maintain, high schools for persons of the negro race. This question that the statute was unconstitutional because of discretion given, was not made in either the Superior or the Supreme Court of Georgia. The latter, in its opinion, P. R., 57, say that this point, violation of Constitution U. S., was not argued before them by the learned counsel for the defendant in error, either orally or by brief, the only mention of it in his brief being at the conclusion, where he states the denial is to violate not only the State law but the Constitution of the United States—fourteenth amendment, citing no other authority to sustain the contention;

neither did he point out in the brief which paragraph of the 14th amendment was violated.

The decision below, Record 35, was based upon the construction of a State Statute, was never excepted to by the plaintiffs and what is said by the Supreme Court on this question is as to the claim in the petition, Record, 57, in violation *of the Constitution of Georgia and the United States.*

The Judge of the Superior Court in his decision, page 36 of the Printed Record, held that the establishment and maintenance of schools of higher grades than common schools, authorized by section ten of the Act, was a matter that rests exclusively in the sound discretion of the Board, but if the discretion is exercised in the establishment or maintenance of schools of higher grade they must be established and maintained in harmony and in compliance with section nine of the said Act, and the Board must provide the same facilities for higher education for both races.

The Supreme Court of the State, reviewing this decision, held, Printed Record, page 55, "That discretion is a power conferred upon "them by law of acting officially under certain circumstances accord- "ing to their own judgment and conscience, not controlled by the "judgment or conscience of others. The powers conferred are legisla- "tive in their character."

And on page 56 say: We think the Board were "not required to "establish a high school for negroes whenever they established one for "whites * * We do not mean to intimate that any public corporation of "this kind can arbitrarily and without reason establish one school and "suspend another, but where it is in its discretion to pass upon facts "and determine from the best interests of the people at large, courts "will not control its discretion unless it is manifestly abused, although "the Court may be of the opinion that the corporation erred upon the "facts," holding also that the 9th section of the Act related entirely to common schools and not to the matter of high schools, and that the 10th section related to separate and independent schools from those established under the 9th section, which were not to be free schools, but pupils were required to pay tuition. *Such a school is therefore "not a free high school."*

In Atchison, Topeka & Sante Fe R. R. vs. Matthews & Trudell, decided Arpil 17 1899. 174 U. S. Reports, 96, this Court held the statuteof Kansas, putting upon railroad companies the burden of proof where damages by fire had been caused by operating the railroad, was not in violation of the 14th amendment, as this amendment did not forbid classification—that "It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public * * * Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In the same case the Court say: "All questions of fact are settled by the decision of the state courts. (Hedrick vs. Atchison, T. & S. F. R. R. Co., 167 U. S., 673, 677. and cases cited in the opinion), and the single matter for our consideration is the constitutionality of

this statute."—As in this case at bar the constitutionality of a delegation of discretion by the statute.

In Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 295, this Court, affirming the previous rulings in 134 U. S., 232 and 148 U. S., 657, say that the 14th amendment was not intended to compel the state to adopt an iron rule of equal taxation. "There is therefore, no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

SECOND ASSIGNMENT OF ERROR, PRINTED RECORD 41.

There was no such finding of the Court below as set out in the language of this assignment. The right to the equal protection of the laws is not denied by a state court when it is apparent that the same law and course of procedure would be applied to any other person in the state under similar circumstances and conditions.

Tinley vs. Anderson, 171 U. S. Reports, 101.

The "due process of law," and which was the proper remedy open to the plaintiffs, was to have the decision of the Board of Education reviewed by writ of certiorari by the State Commissioner, which was not resorted to, and the time to sue out the same allowed to expire without any resort thereto.

In Dewy vs. DesMoines, 173 U. S., 198, the Court say: Parties are not confined here to the same arguments which were advanced in the Court below upon a Federal question there discussed. Having, however, raised only one Federal question in the Court below, can a party come into this Court from a State Court and argue the question thus raised, and also another not connected with it and which was not raised in any of the Courts below and does not necessarily arise on the record, although an inspection of the record shows the existence of facts upon which the question might have been raised?" Here the assignment claims violation of the Constitution as a whole without specification which is not a sufficient compliance with the rule.

THIRD ASSIGNMENT OF ERROR, PRINTED RECORD 41.

This assignment, that the Court decided that negroes could consistently with the Constitution of the United States be by the laws of Georgia taxed and the money derived therefrom appropriated to the establishment and maintenance of high schools for white persons, while pursuant to the same law said Board at the same time refused to establish and maintain high schools for the education of persons of the negro race, does not specify the particular portion of the Constitution of the United States which is violated, nor the true decision rendered. To understand the error in the sssignment, reference is made to the facts.

1st. The educational tax for 1897 arose from the tax levy of the state, poll tax of the County of Richmond, and the State Educational Fund

tax, to which was added the tax imposed by the Board of Education itself and required of the tax collector, P. R. 9, of $45,000.00. The proportion of the amount assessed for the colored schools was far in excess of the entire tax upon the colored population. These plaintiffs in error, see affidavit of the Tax collector P. R. 33, had assessed against them as a whole $23.17, of which amount, according to the averments in their petition, ten per cent. to-wit: $2.31, was appropriated to the "system of high schools."

2nd. In their answer the Board say, P. R. 12, that in their view, until the local trustees—i. e., the city conference board—should have furnished a sufficiency of primary schools for the colored population it would be unwise and unconscionable to keep up a high school for sixty pupils and turn away three hundred little negroes who are asking to be taught their alphabet and to read and write. That no part of the funds of this board accrued or accruing, and no property appropriated to the education of the negro race, has been taken from them. This Board has only applied the same means and moneys from one grade of their education to another; and in this connection says that the enrollment in the colored school in this year is 238 more than last, the Ware High School building accommodating 188 pupils.

So, in fact, there was no appropriation of the tax assessed on the colored people under this law to the support of white high schools, but all of it was applied in the discretion of the Board by adding it to what had been appropriated for primary education of the negro race and increasing the number of pupils.

FOURTH ASSIGNMENT OF ERROR, PRINTED RECORD 41.

That the Court erred in dismissing the complaint of the plaintiffs in error.

If this is a proper assignment of error (which is denied), it opens to the Court the whole case, which I proceed to discuss.

THE CONSTITUTION OF THE UNITED STATES.

1. Plaintiffs originally based their application for relief by injunction on the fourteenth amendment of the Constitution of the United States, which, among other things, provides: "*No State* shall make or enforce any law which shall abridge *the privileges or immunities of the citizens of the United States;* nor shall *any State* deprive any person of life, liberty or property, without due process of law, nor *deny to any person* within its jurisdiction the equal protection of the laws." This language of the Constitution does not confer any power on the Congress except to correct any illegal state action. Congress can pass no affirmative legislation in reference to negroes thereunder. It is solely a prohibition on the power of the state.

163 U. S., 543-4, 549, 551. Plessy's case.
109 U. S., 3, 10, 13. Civil right cases.
16 Wallace, 36. Slaughter House cases.

The meaning of the Fourteenth Amendment of the Constitution of the United States is thus explained in the following cases:

Plessy's case, in 163 U. S., 537, arose relative to an Act of Louisiana requiring railroads to provide equal but separate accommodations for white and colored on their cars. In this case it was held that the conductors could eject a negro and he could be jailed for riding in a car reserved for white persons, and that this law was not in conflict with the Thirteenth and Fourteenth amendments of the Constitution. The Court say, speaking of this amendment (163 U. S., 543, citing the Slaughter House cases, 16 Wallace, 36): "It's main purpose was to establish the citizenship of the negro and to give definition of citizenship of the United States and of the states, and to protect from the hostile legislation of the states *the privileges* and immunities of *citizens* of the United States, *as distinguished from those of citizens of the states,*" (page 544). "The object of the amendment was undoubtedly to enforce the *absolute equality* of the *two races before the law*, but in the nature of things it could not have been intended *to abolish distinctions based upon color*, or *to enforce social* as distinguished from political equality, or a comingling of the two races upon terms unsatisfactory to either." Therefore laws have been enacted providing for the support of separate schools for white and colored children, and forbidding intermarriage between the races, &c.

Again, on page 546, in "The Civil Rights Cases," 109 U. S., 3, above cited, it was held an Act of Congress entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, etc., of inns, theatres, etc., "and made applicable to citizens of every race and color regardless of any previous condition of servitude," was *unconstitutional and void*, upon the ground that the Fourteenth amendment was prohibitory *upon the states only*, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the states were prohibited from making or enforcing certain laws or doing certain acts, *but corrective legislation*, such as might be necessary or proper for counteracting and redressing the effects of such laws or acts. In delivering the opinion of the Court, Mr. Justice Bradley observed, "That the Fourteenth amendment does not invest Congress with power to legislate on subjects that are within the domain of state legislation, but to provide modes of relief against state legislation or state action of the kind referred to."

In 93rd New York, 435, *People vs. Gallager*, *mandamus*, was applied for to compel the principal of a public school to admit a negro pupil, and the Court held he was not entitled to the *mandamus*, as there was another school he could attend. In construing the Fourteenth Amendment the Court say: "In speaking of the *privileges and immu-*
"*nities* which the state is forbidden to deny the citizens, they are
"referred to as the *privileges and immunities* which belong to them as
"*citizens of the United States.* It has been argued from this language
"that such rights and privileges as are granted to its citizens, *and de-*
"*pend solely upon the laws of the State for their origin and support, are not*
"*within the constitutional inhibition*, and may lawfully be denied to any
"class or race by the states at their will and discretion. This construc-
"tion is distinctly and plainly held in the Slaughter House cases (16

"Wall, 36), by the Supreme Court of the United States. The doctrine "of that case has not, to our knowledge been retracted or questioned by "any of its subsequent decisions.

"It would seem to be a plain deduction from the rule in that case that "the privilege of receiving an education at the expense of the state, "being created and conferred solely by the laws of the state, and always "subject to its *discretionary regulation* might be *granted or refused to any "individual* or class at the pleasure of the state. This view of the "question is also taken in State, ex rel.. Garnes vs. McCann, (21 Ohio "St., 210), and Cory vs. Carter (48 Ind., 337; 17 Am. Rep., 738). The "judgment appealed from might, therefore, very well be affirmed upon "the authority of these cases."

This last decision of the Supreme Court, 163rd U. S., 550, leaves the states with the power to reasonably regulate the negro in the enjoyment of his civil and social rights in accordance with tradition and custom, and unless his rights are greatly abused, he has no cause of complaint. The state need not provide for *his education* unless it sees fit.

The fundamental mistake of the Plaintiff's in this case is in supposing that the Fourteenth Amendment of the Constitution of the United States controls this case, and that *equal protection* of the laws mean *equal privileges.* The contrary to this principle is shown in three cases cited In *exparte Kenny,* 3rd Hughes, 16, the matter is logically discussed.

The Fourteenth Amendment of the Constitution of the United States provides that no state shall make or enforce any law which shall abridge the *privileges of citizens of the United States,* nor deny to any person within its jurisdiction the equal protection of the laws. The only *privileges* guaranteed by this section are those of persons who are citizens of the United States: "No state shall abridge the privileges of citizens of the United States. Privileges of citizens of the United States are those protected by this amendment, and they are the only privileges that are protected. The *equal protection of the laws* is guaranteed "to any person within its jurisdiction," that is the jurisdiction of the state. There is a difference between citizens of the United States and citizens of states. The rights which a person has as a citizen of the United States, are such that he has by virtue of his state being a member of the American Union under the provision of our national Constitution." As for example, "a citizen of Virginia is allowed by "her laws to carry on business by paying a certain tax, a citizen of "Maryland who comes into Virginia and pay the same tax is entitled "under the national Constitution, to carry on the same business in Vir-"ginia." The Virginian carries on business in his state by right of his *state citizenship.* The Marylander carries on business in Virginia by right of his *national citizenship.*

The amendment further provides that no state shall "deny to any per-"son within its jurisdiction the equal protection of the laws." "Here is "a distinction between citizens of the United States and "*any person,*" "whether citizen or alien, residing or "happening to be within the "borders of a state. The *declaratory* clause forbids any abridgment of the "rights of citizens of the United States." The *remedial* clause gives "equal "protection to all persons whatever while within a state's borders.

"The amendment does not provide that the *privileges shall be equal*, but "it does provide that *protection shall be equal*. It establishes equality "between all persons in their *right to protection*, but does not confer "*equality in the privileges they are to enjoy*. It provides that whatever "privileges the Constitution and laws of the United States confer upon "a citizen as a citizen of the United States shall be enjoyed without "abridgement; and it provides that all persons within a state, whether "a citizen of the United States, or of the states, or aliens, shall be "equally protected by the laws in whatever privileges, whether equal "or not equal, they may have from the United States or from the "state. However *unequal their privileges* respectively, yet a foreigner, "a citizen of another American state, and a citizen of the state, shall "have the benefit equally in the state of all remedial laws for the re- "covery of rights and of all legal safe-guards ordained for the protec- "tion of life, liberty and property.

"I think it plain from this review, that an *equality of privileges* is not "enforced by the Constitution upon a state *in respect to its domestic laws* "for the government of its own citizens as such, while they are within "its jurisdiction."

Therefore, whether a state will educate its citizens or not, is a question with which the United States Constitution has nothing to do. It is a matter of purely domestic concern an internal police regulation. If the state does not see fit to educate its citizens, Congress cannot compel it under the Constitution, but if the states determine to give educational facilities to its citizens, it is in its province to do so in the exercise of its police power.

113 U. S., 27–31; 135 U. S., 131; 136 U. S., 436–449; 140 U. S., 555.

In *Giozza vs. Tierman*, 148 U. S., 662, the Supreme Court say, speaking of the Fourteenth Amendment: "The amendment does not take "from the states these powers of police that *were reserved* at the time "the original Constitution was adopted. Undoubtedly it forbids any "arbitrary deprivation of life, liberty or property, and secures equal "protection to all under like circumstances in the enjoyment of their "rights; but it was not designed to interfere with the power of the "state to protect the lives, liberty and property of its citizens, and to "promote their health, morals, *education* and good order." Citing:

Barbier vs. Connelly, 113 U. S., 27–31. *In re* Kemler, 136 U. S., 436.

THE SCHOOLS.

1. The question in this case is how has the state acted? The Act of 1872 and amendments established the County Board of Education. This Act provides for regulation of public instruction in Richmond County. The establishment of district schools, under the control of the district trustees, (Section 6, *was mandatory*. These trustees *were required* to erect schools. Their kind was not designated in the Act, but they were to be for the district. Whatever they were, *equal facilities* in these schools were to be given to the whites and blacks, and the schools were to be separate for both races. Under this Act the district trustees have established what are known as primary

schools, wherein the elementary branches of an English education were taught. And this was but a repitition of the general state policy. See Act 1872, pg. 66.

By Section 10 of the Act the *whole County Board may* establish schools of higher grade at such points in the county as the interest and convenience of the people may require. Over these higher schools the whole Board acts for all the people "with full power." The Board is elected by the people, and any improper action by the Board can be corrected at the voting polls. Proper men can be returned as members of the Board.

These schools, when established by the Board, are to be partly supported by contributions from the taxes of the several districts, and by tuition under Act of 1877. The State has, therefore, promised a common school education. *That much is free.* She permits higher schools to be established—if the Board, the representatives of the people, wish it. The Board "may establish," *and pupils pay* for tuition. It is not a free public high school. The want of or necessity for such school is to be determined by the Board.

Under this power high schools have in the past been established, and have been discontinued at the discretion or legislative will of the Board, as the public need or wants required. The Tubman High School for white girls has been established, which is maintained by aid from the Board and the tuition paid by pupils, $15 a year. The Ware High School for negro boys and girls was established, $10 per annum, and has been temporarily discontinued. The question is, *can its re-establishment be compelled?*

The Board is a legislature for the purpose of determining this question. The legislative power on the subject of education is under the Act of 1872 delegated by the Legislature to the whole County Board of Education. It can act or not as it sees best. Such a delegation of power is legal (71 Ga., 856; 72 Ga., 554; 73 Ga., 604; 78 Ga., 672; 70 Ga., 694.) The power to establish is necessarily legislative in its character. To declare what shall be in the future is essentially a legislative power (19 Am. E. C. L., 391.) The power to establish includes the power to vacate and annull (44 Ga., 465; 51 Ga., 227; 22 Ga., 535). From legislative action there is no appeal, except to enlightened public opinion. Ib., 118 U. S., 370.

The Courts will not interfere. 72 Ga., 353 (c), 358, bottom, 554; 52 Ga., 212; 50 Ga., 179; 19 Ga., 471; 43 Ga., 67.

The establishment of discontinuance of a school being legislative is a matter entirely within the discretion of the Board, and as the Board is not distinctly required to establish a system of high schools, and has not done so, they cannot be compelled to exercise their legislative power. Cases *supra* and Mobile School Commissioners vs. Putnam, 44 Ala., 506-537, cited from 13 Am. E. C. L., 223, bottom, 54 Ga., 426; 75 Ga., 433; 72 Ga., 553; 17 Ga., 56 (4)-612; 19 Ga., 471; 19 Am. E. C. L., 463; 118 U. S., 370). As the Board are not required to establish a high school system or a single high school, it cannot be compelled to exercise

their legislative power to re-establish one high school for negro boys and girls where there is no sufficient reason therefor. No system of high schools has been established as the wants of the community never required it.

The Board has never established a free high school. It cannot establish such, because the direction of the legislature to charge tuition is practically a limitation on the power to make a free school, and such a legislative act is equivalent to saying there shall be no purely free high school, only the district and primary schools are free. The petitioners ask the establishment of a school for boys and girls when this Board does not maintain anything but a high school for white girls, and that because the property was given for that purpose. The power to charge tuition, was by Act of 1877, p. 347, passed in February, prior to the Constitution of Dec. 21, 1877, and the cases in 27 S. E. R., 710; 96 Ga., 477 and 86 Ga., 605, have no application—They are based on action under the Constitution of 1877. Defendant has never had a *free high school.*

Defendant therefore cannot be compelled to establish a free public high school for negro boys and girls.

(a). The state has not put the imperative or mandatory duty on defendant to do so.

(b). By directing tuition to be charged, the State has forbidden the establishment of free high Schools in Richmond county.

(c). It has not established a high school for white boys and girls.

DISCRETION OF THE BOARD.

No imperitave duty being put on the Board, there is no breach of duty for petitioners to complain of, nothing to compel the Board to do.

The Tubman building was given for a high school, and for such the Board accepted it.

The plaintiffs do not offer defendant a school building, and ask defendant to establish a negro girl school therein. They ask the re-establishment of a school for negro boys and girls, which the whites do not have. Until they donate a proper building and the Board refuses, they are not in a position *to complain of a want of equality and identity of benefits*, and defendant can establish a white high school solely.

In Chrisman vs. Brookhaven, 12 Southern Reporter, 458, the Supreme Court of Mississippi, Jan. 30, 1893, say :

"1. The constitutional provision requiring the legislature to estab-
" lish and maintain a uniform system of free public schools *does not pre-*
" *vent its providing* for the establishment outside of that system of *a school*
" *exclusively for whites*, and the issue of bonds by the town in which it is
" located to pay therefor.

"2. The constitutional provision for equal and uniform taxation does
" not prevent local taxation for local purposes and benefits.

"3. Const. 1869, art. 1, §21, with its proviso inhibiting any distinc-
" tion among citizens, does not prevent legislation making separate
" provision from the different races in the matter of schools."

The Act of 1872, Section 10, leaves the establishment of high schools entirely to the discretion of the Board, not compulsory; nor are *equal*

facilities in high schools required to be given under the 10th section. The Board is simply to meet the public wants as far as it can do so. The high schools under §10 are permissive and are outside the public primary school system—no part thereof—the primary are *free*, the high schools are *pay*, and attendance voluntary.

The question of financial distribution of taxes must be left somewhere. The law has given that to the County Board, with legislative power. Petitioners have not :

(a). Shown *any inequality in the law itself*, which is what the Constitution forbids (see Strauder vs. West Virginia, 100 U. S., 303, head note 5); 163 U. S., 543-4; 93 N. Y., 447.

(b). Nor that by any action of the Board have they been denied any *equal protection*. 3rd Hughes, 16.

(c.) No taxes have been levied or collected exclusively for *high schools*. The levy made is the same as was approved by S. C. Ga., in 72 Ga., 554; 74 Ga., 43, as to this Board.

The *regulation of education*, like the regulation of public health, morals, &c., &c., is governed by the police power of the state, and not by the Fourteenth Amendment of the Constitution.

Barbier vs. Connelly, 113 U. S., 27-31.
Leisy vs. Hardin, 135 U. S., 131.
Giozza vs. Tienan, 148 U. S., 662.
In re Kemmler, 136 U. S., 436-449.
In re Rahrer, 140 U. S., 555.
Paupe, Ex., vs Seibert, 142 U. S., 354.
Cantini vs. Tilman, 54 Fed. Rep., 974.

Because the police power is among the *powers reserved to the States* at the time of the adoption of the Constitution, and not submitted to Congress or the General Government under the Constitution.

56th Fed. Rep., 356; 11th Peters, 102.
51st Fed. Rep., 788; 111th U. S., 747.
127th U. S., 678; 148 U. S., 662.
167 U. S., 47; 165 U. S., 182.

EQUAL PROTECTION.

This cannot mean *equal benefits* (*cases cited above*) or the Slaughter House cases would not have been decided as they were. There an exclusive privilege was given a corporation to slaughter animals in New Orleans. This was held by the Supreme Court to be a proper exercise of the police power, and *not unreasonable*, although it was a monoply. 16 Wallace, 36-62; 111 U. S., 746; 93rd N. Y., 447.

Nor authority to so regulate the beer trade, as *to destroy* a brewery. Mugler vs. Kansas, 123 U. S., 623-664.

The most extreme authority that gives any such views as that advanced by petitioners are the cases decided by Judge Barr in Kentucky. In Anderson vs. Louisville and Nashville Railroad, 62nd Fed. Rep., 48, he says:

"The Fourteenth Amendment to the Constitution of the United

"States *prohibits discrimination* by a state because of race or previous "condition of servitude, and, indeed, secures to all of its citizens "certain fundamental rights as against state action, but it does not "secure *the joint and common enjoyment of such rights.* It is the equality "of right which is secured, and not the joint and common enjoyment "of such right." Civil Rights Cases, 109 U. S., 3; 3 Sup., Ct., 18; U. S. "vs. Buntin, 10 Fed., 730; Claybrook vs. Owensboro, 16 Fed., 297.

In *Davenport vs. Cloverport*, 72 Fed. Rep., 694, Judge Barr, adopting 16 F. R. 302, says: "The equal protection of the laws guaranteed by " this amendment must and can only mean that *the laws of the state* " must be equal in their benefits, as well as in their burdens, and that " less would not be the equal protection of the laws. This does not " mean *absolute equality* in distributing the benefits of taxation. That " is impracticable. But it does mean the distribution of the benefits " upon some fair and equal classification or basis."

Judge Barr says: "This does not mean absolute equality in distributing the benefits of taxation—this is impracticable."

Yet this has been done for petitioners.

(a). The same money is spent now as was spent before, and more negroes taught.

(b). Other high school education is in the city and at same cost to them. Some of petitioners' children have gone there as they should have done. 10 Fed. R., 736. White boys go to a pay high school.

(c). The petitioners do not offer the Board a school house for a high school for negro boys and girls.

(d). The Board has not established such a school, i. e., for white boys and girls.

In *Reid vs. Eatonton*, 80 Ga., 756, the constitutionality of the Act of October 24th, 1887, (P. L., 839,) in reference to schools at Eatonton, was before the Court. This Act provided for bonds to be issued for the erection of white and colored schools, and in the distribution of the funds raised by the bonds, it was to be divided between the whites and negroes on the following basis (Section 2): "That in no event shall the "amount appropriated to each school exceed the *pro rata* part of the "taxes paid by the white and colored people of said city, as shown by "the tax digest of said city." A white taxpayer sought to enjoin the distribution, on the ground that it was unlawful discrimination against the negroes. It appeared that the negroes themselves, as a class, were not complaining, and this Court held that the white taxpayer had not sufficient interest to bring the suit, and said further: "Even if the com- "plainant had a right to file this bill, we are not prepared to hold that "the injunction should have been granted, or that the Act was uncon- "stitutional."

In the distribution from school taxes the negroes in Augusta receive over $17,000 more than what they—the negro race—pay in. Suppose they were allowed only what they pay in, as in the Eatonton case. The parties who are complaining do not show a sufficient interest to bring the suit, or that they represent the negroes as a class, or how they will be damaged by the continued payment of the taxes charged against

them, or that they themselves are being deprived of an education. 72 Ga., 553, (c).

Many inequalities in the execution of state laws exist, and are allowed, notwithstanding equal protection is the rule, such as:

(a). Venire not required to have negroes on list for trial before a petit jury, 100 U. S., 315 (7), 321; 107 U. S., 110. Nor on list grand jury, 162U. S., 580–566.

(b). No person allowed to speak on "Boston Common" in absence of permit from Mayor. Reasonable regulation, 167, U.S., 47; 165 U.S., 180-2.

(c). Woman and foreign residents not on jury. 100U.S., 335, 162U.S., 565

(d). No negro and white judge not required on bench. 100 U. S., 335.

(e). Citizens of a state can have privileges not given citizens of the United States, Slaughter House case. 16 Wall, 38; 3 Hughes, 16.

(f). No woman practicing law. 16 Wall, 130.

(g). Marriage between negroes and whites, not allowed. 39 Ga., 321; 163 U. S., 545; 3 Hughes, 16; 1 Wood R., 537; 3 Woods, 367.

(h). Negroes not allowed in Theatres, Inns, Cars, etc. 16 L. R. A., 560; 109 U. S., 3; 163 U. S., 544 and 550.

(i). Even a discrimination based on color is not illegal. In *Lehew vs. Brummel*, 15th S. W. Rep., 765, the Supreme Court of Missouri say speaking of the Fourteenth Amendment: "The common school system of this state is a creature of the State Constitution and the laws passed pursuant to its command. The *right of children* to attend the public schools is not a privilege or immunity belonging to a citizen of the United States as such. It is a right created by the state, and a right belonging to a citizen of this state as such. We then come to the last clause, which is prohibitory of state action. It says: "Nor shall any state deny to any person within its jurisdiction equal protections of the laws." Speaking of this clause in its application to state legislation as to colored persons, Justice Strong said: "What is this but declaring that *the law* in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and, in regard to the colored race for whose protection the amendment was primarily designed, that *no discrimination* shall be made against them by law *because of their color*?" *Strauder vs. West Virginia*, 100 *U. S.*, 303. We then come to the simple question whether our Constitution and the Statutes passed pursuant to it requiring persons to attend schools established and maintained at public expense for the education of colored persons only, deny to such persons "equal protection of the laws." It is to be observed, in the first place, that these persons are not denied the advantages of the public schools. The right to attend such schools and receive instruction thereat, it is guaranteed to them."

But it will be said the classification now in question is one *based on color*, and so it is; but the color carries with it natural race peculiarities, which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences created different social relations, recognized by all well organized governments. If we cast aside chimercial theories and look to practical results, it seems to us it must be conceded that separate schools for

colored children is a regulation to their great advantage. It is true, Brummell's children must go three and one half miles to reach a colored school, while no white child in the district is required to go further than two miles. The distance which these children must go to reach a colored school is a matter of inconvenience which must arise in any school system. *The law does* not undertake to establish a school within a given distance of any one, white or black. The *inequality in distances* to be traveled by the children of different families is but an incident to any Classification, and furnishes no substantial ground of complaint.

Equality of protection of the law is never determined on the color line. No line can be drawn in public institutions between citizens, on *the color idea*. If color can determine, then equality would mean *equal* number of negroes and whites in all matters—such as juries—6 to 6. City Council. Judges of one negro, one white, etc., etc. *No, the color line* is a fundamental error to illustrate equality of protection under the Constitution. See 16 Federal Reporter, 301; 100 U. S., 314–335; 163 U. S., 544–551. Otherwise "white men's houses painted white—negroes painted black," &c., &c., 163 U. S., 549.

A person may be equally protected and received no benefits. Read 100 U. S., at 335; 163 U. S., 550.

DISTINCTION BASED ON COLOR.

While discrimination *in the law* on account of *race and color* is forbidden. 162 U. S., 580. Yet say the Supreme Court, the Fourteenth Amendment to the U. S. Constitution "could not have intended to "abolish *distinctions based on color*." 163 U. S., 544 top, 551 bottom. They arise from nature. 15 S. W. R., 765 or 766.

While equality of legal rights is what is protected, yet this does not mean *identity* of *benefits*, nor *joint and common* enjoyment of benefits of school funds from taxation. 62 Fed. R. 48; 72 Fed. R., 694; 3 Hughes, 16. Equal protection does mean *equal privilege*. 3 Hughes, 16; 100 U. S., 335 middle; 163 U. S., 550.

When there is no discrimination against *the negro race* in the law itself on account of color, or previous condition of servitude, it is then a question whether the administration of the law *is reasonable*, and "in determining this question of reasonableness (the "state authority) is at liberty to act with reference to the established "*usages, customs and traditions* of the people," etc. 163 U. S., 550 bottom; 100 U. S., 321, 335. General Act 1872, pp. 69. If the action excluding the negro be based on any conditions other than because of his color, or race—then the constitutional amendment has no application. Reasonable action towards the negroes has been had here. Those desiring a high school education, which the state *has not promised should be free*, and which has never been free, and for which the County Board charged $10 each, when the Ware High School existed—can now go to other equally accessible high schools at $8 a year—which schools did not exist when the Ware High School was opened. The evidence is that children of petitioners have now gone to these schools.

CONCLUSION.

In the Slaughter House Cases, 16 Wall, 81, this Court say, as to a claim of unconstitutionality of an Act of the legislature of the state of Louisiana, that the construction claimed by the plaintiffs in error "would constitute this Court a perpetual censor upon all legislation of the state, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with these rights as they existed at the time of the adoption of this amendment," and when speaking of the fourteenth amendment say, "We doubt very much whether any action of the state, not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

In the case of the Texas & Pacific Ry. Co. vs. The Inter-State Com. Commission, 162 U. S., pp. 199 and 238, this Court say, "The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the commission in the light of all the facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was." And in the syllabus of the case, p. 199, say, "The mere fact that * * * disparity between through and local rates was considerable, did not warrant the Court in finding that such disparity constitutes any undue discrimination."

No evil eye or combination is averred or shown against the Board of Education, and the worst charge that can be brought against it is an error of judgment in applying the money raised by taxation, from a high school for the blacks to a primary school for the blacks.

The evidence clearly established the necessity for this course, but petitioners insisting on re-establishing high schools brought this case to *enjoin the operation* of all the high schools; also a separate suit by mandamus to compel a re-establishment of the school. Both cases were decided against them by the Supreme Court of Georgia. 103 Ga, Reports, 641, 105 Ga. Reports, 463. Error is assigned here only to the decision in the injunction case, 103 Ga. Reports, 641. The highest tribunal in the State of Georgia having construed the 10th section of the Act of 1872, and sustained the action of the Board as a wise and judicious exercise of its legislative discretion which could not be interferred with, this Court is respectfully asked to affirm the judgment.

Frank H. Miller.

Supreme Court of the United States.

OCTOBER TERM, 1899.

NO. 164.

J. W. CUMMING, et al.

vs.

THE BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA.

ERROR TO THE SUPERIOR COURT OF RICHMOND COUNTY, GEORGIA.

STATEMENT.

The return shows:

The Board, which under the Act of 1872, had been organized since January, 1873, had never established any *system* of pay High Schools—conceiving that it was neither made its duty nor had it authority to establish such system. Its power in this regard was limited to establishing such pay High Schools in the county as the interest and convenience of the people may require. Act 1872, Sec. 10, p. 460.

In pursuance of this authority, this Board has always exercised the power of establishing and suspending and abolishing pay High Schools, according to its means, and as in its deliberative and judicial discretion, the interest and wants of the people might require. At one time and another it has had five High Schools, to wit: A boy High Schoool at the Richmond Academy, the Tubman High School for girls, the Hephzibah High School for boys and girls, and the Summerville High School for boys and girls, and the Ware High School for colored boys and girls.

The school in Summerville was abolished June 1, 1878, when the trustees of the Summerville Academy received the income of a fund devised under the will of William Robertson for the support of teachers in that village. The trustees of the Richmond Academy having resumed full control of that institution (July 1, 1878) the high school under this Board was discontinued and never re-established.

In pursuance of the authority delegated to the Board by the 10th Section of Act of 1872, p. , the Board, on the day of , established the Tubman High School in the city of Augusta. The late Mrs. Emily H. Tubman, having presented to the Board a large lot and building for the purpose of affording a higher education to the young women of the county, and the Richmond Academy affording this advantage and benefit to the male sex, this Board deemed it wise and proper, and responsive to the public want, to institute this school, each pupil from the county to be charged $15 per annum, non-residents to pay $20, these being the sums charged by the Richmond Academy for boys.

The property was donated upon express condition that in the event the Board should fail to use the Academy for a high school the same was to enure instantly to the Richmond Academy and Augusta Free School. The value of this property, with fixtures, is now not less than $30,000.

Thereafter, in 1876, the Board thought it expedient and proper to give its assistance to the Hephzibah High School, being a school conducted and controlled by the Hephzibah Baptist Association, in the village to Hephzibah, in the southeastern portion of the county, charging for each pupil the sum of $15 per annum.

Thereafter, in 1880, there being no high school for the colored race, and the funds of this defendant justifying it, and other schools of lower grades being established by the local trustees in the city of Augusta, sufficient to accommodate the colored children, the Board deemed it wise and proper to establish the Ware High School, charging for each pupil taught therein ten dollars per annum.

At a meeting of the Board in June, 1888, a special committee was appointed to investigate the status of the high schools with instructions to report to the July meeting of the Board, and submit such recommendations as in its judgment might be proper and necessary.

This committee held divers meetings and made a thorough investigotion as instructed, and duly reported to the July meeting.

Touching the Ware High School, its friends and the colored patrons thereof were called before the committee, and were heard by the committee with every respect and consideration. They were told the reasons which controlled the committee in its intention to recommend the discontinuance of the school. These reasons were: Because four hundred or more negro children were being turned away from the schools of primary grade, unable to be provided with seats and teachers. Because the same means and the same buildings which were used to accomodate sixty pupils of high school grade, would accomodate two hundred pupils in the rudiments of education. Because the Board, at this time were not financially able to erect buildings and employ additional teachers for the large numbers of colored children, who were in need of primary education. And because there were in the city of Augusta at this time, three colored public high schools, to wit:

The Haines' Industrial School (Presbyterian), had an income of $3,500. The Walker Baptist Institute (Baptist), an income of $2,598. The Payne Institute (Methodist), an income of $7,344. (Total $13,442).

The reports of the committee were as follows:

REPORT OF COMMITTEE ON TUBMAN HIGH SCHOOL.

AUGUSTA, GA., July 10th, 1897.

To the Board of Education:

The Committee appointed to investigate the condition of the High Schools and to make such recommendations as they deem wise, beg leave to make the following report on the Tubman High School:

This building is the generous gift of Mrs. Emily Tubman made to the Board of Education over twenty years ago for the purpose of af-

fording an higher education to the young ladies of our city. The building has been very much enlarged and improved at the expense of the Board. The school has grown in numbers every year until now about 200 pupils are on the roll. Mr. John Neely is the principal of the school and is assisted by Miss Mary A. Coffin, Miss A. B. Coffin, Miss Zoe Barclay, Miss Elizabeth Vannerson; in addition there is a department of French by Madame Esmery, of Stenography and Typewriting by Miss DeHay. Music and Penmanship are taught in the School by the regular directors of those branches of the City Schools.

It is not amiss for your Committee to say that they recognize the necessity of a High School for girls to be operated by the Board of Education, because there is no other sufficient institution of this kind in the city. The Richmond Academy in our city is a High School where the boys of our schools can attend. There are High Schools for the accommodation of the negro boys and girls. And so the necessity of providing for the education of the white girls of the city is the one need that the Board of Education cannot escape. This is a sufficient reason for maintaining the Tubman High School.

Your Committee bears cheerful testimony to the faithful performance to all duties devolving upon the principal and his assistants. They have been devoted to the work, and the popularity of the School is a sufficient evidence of efficiency. Your Committee unanimously reports that the status of the Tubman High School is satisfactory and that the present management be continued.

Respectfully submitted,

JOS. GANAHL, Chairman,
and others Committee.

REPORT OF COMMITTEE ON HEPHZIBAH HIGH SCHOOL.

Report: The committee to whom was referred the investigation of the status of the High Schools under this Board, and their relation thereto, with instruction to report to the July meeting of the Board, and submit such recommendations as in its judgment may be proper or necessary, make the following report:

HEPHZIBAH HIGH SCHOOL.

Your committee find that the Board of Education of Richmond County, commenced relations with this school in 1876, when Mr. James Carswell was the principal thereof. It was theretofore from 1860, when first instituted, exclusively, conducted and controlled by the Hephibah Baptist Association.

Mr. Carswell informs your Committee, no minute of the matter appearing in the records of this Board, that it was agreed between the Board and the Association that the latter should select and nominate a teacher for the School and the Board should, if the nominee were satisfactory, elect him to the position. That this teacher should be paid six

hundred dollars per annum from the funds of the Board; that tuition fees of $15 per annum should be collected by the teacher from the pupil, which sums were to be credited to the six hundred dollars. In this way the expense of the High School to the Board would be reduced to about $300 per annum. The principal was allowed to charge full tuition fees for pupils residing outside of Richmond County, without accounting for the same to the Board.

Since that time this Board has agreed to pay to a teacher of vocal music the sum of $20 per month for nine months, or a total of $180 per annum.

This contractual relation has continued on and exists to this day. Mr. Carswell was succeeded by Mr. Ellington, and Mr. Ellington by Mr. C. H. L. Jackson, the present incumbent, who has held the position for twelve years past.

The Association owns the building in which the school is conducted. This Board owns the school furniture, pays insurance on furniture and building, keeps the building in repair and pays salary of Janitor.

Besides these the Principal receives from the Local Trustees of Hephzibah Village $540.00 per annum; from 121st District $400.00; from 124 District $61.00; making a total of $1,601.00, which when added to insurance, $25.00; janitor, $72 and music, $180.00, makes a grand total of $1,878.00, which this Board and the Local Trustees pay annually towards the support of this School.

The principal is nominated to this Board by the Local Trustees of Hephzibah District. He appoints his own corps of assistants with the approval of these Local Trustees. This corps at present consists of R. E. Cobb, Musical Director; Miss Sarah A. Kilpatrick, Primary Department; Miss Clara M. Seago and Miss Baker, Intermediate Department; Miss Sarling, Elocution; Miss Hattie E. Carswell, Art Department.

The assistants do not derive any qualification from examinations and certificates demanded by this Board of other of its teachers.

The School is a large one. From the report made to Hepzibah Baptist Association in October last, we find the enrollment reached in 1896 to the number of 299 pupils.

After a searching inquiry your Committe have reached the conclusion that the School in all its grades is excellent; conducted with great fidelity in all of its departments; giving with intellectual development, exemplary moral training and religious example; and that the cause of education is advanced to the full value of the money paid out by this Board.

The situation is anomalous and is hardly consistent with the scheme upon which the Public School System of Richmond County was instituted by Act of 1873 and subsequent amendments.

The scheme was for this Board and the Local Trustees thereof, to conduct and maintain their own Schools *exclusively;* not to support private or other Educational Institutions of the County.

It is easy to discover errors; it is difficult to provide a remedy; for it so happens that the remedy often is worse than the disease.

To withdraw our pecuniary support from the Hepzibah High School, at a time we are not financially competent to provide another of

equal value to the cause of education would work greater wrong than to allow the anomaly to continue.

Your committee, therefore, advise that for the present no action changing the present status and relation of the Hephzibah High School towards this Board be taken.

They opine, however, that the school should come more strictly under discipline and superintendence of this Board.

To this end your committee recommends that the assistants of the school be required to undergo due examination and obtain the certificates required of other schools under our system; that the curriculum of its departments and the text books used be submitted to the Secretary of this Board and our Text Book Committee, and that the corps of teachers be submitted to this Board for election, as is the Principal of the school.

Respectfully, &c.,

JOS. GANAHL, Chairman, and others Committee.

REPORT OF COMMITTEE ON WARE HIGH SCHOOL.

AUGUSTA, GA., July 10th, 1897.

To the Board of Education:

The committee appointed to investigate the status of the High Schools of the city and county, to ascertain the relation they sustain to the Board of Education, and to make such recommendation thereon as in their judgment seem wise and necessary, beg leave to make the following report and recommendations regarding the negro high school known as the Ware High School:

This school has been in operation under the Board of Education for the past fifteen or sixteen years. It was first under the charge of one teacher, Richard R. Wright, and was located on upper Reynolds street. When Wright resigned, four or five years ago, he was succeeded by Henry L. Walker, the present incumbent, and the school was moved to the corner of Twiggs and Walton streets. The number of pupils increased to about sixty, and an additional teacher was added as an assistant to the Principal. The school has been in a very prosperous condition, and the Principal and his assistants have done faithful and satisfactory work, so far as their teaching is concerned. The Principal of the school is paid $807.50 and the assistant $340; the janitor is paid $45; incidental expenses about $100, making a grand total of expense of $1,292.50. The tuition fees amount to ten dollars a year for each pupil. The amount collected this year has been about $450. This makes a net cost of the school of $842.50.

Your committee has been informed that four or five hundred negro children are annually turned away from the primary grades of the city schools because they are unable to find seats. The Board of Education is not able to erect additional buildings and employ additional teachers for the accommodation of this large number of negro children who desire to obtain the rudiments of an English education. A very natural in-

quiry suggesting itself to your committee is, whether it would not be best to take the $842.50, which represents the net cost of running the negro high school for the benefit of about sixty pupils who desire to study the higher branches, and with it employ four primary teachers, who would teach about 250 pupils the rudiments of an education? It certainly seems wise to give as many negro children the advantage of a primary education as possible, and teach them all to read and write and calculate, rather than advance a few of them through the high schools. If the Ware High School be abolished by the Board of Education, the same money that it now costs will accommodate 250 more children in the primary schools.

Your committee observes the fact that there is no lack of high schools for negro children in the city. There is the Haine Industrial School, the Walker Baptist High School and the Payne Institute, all designed for the higher education of negro boys and girls. While these are denominational schools, yet the fees they charge are moderate, and is not in evidence that their teaching is sectarian. Your committee believes that all of the students now attending the negro high schools can be accommodated in these schools, without additional expense to them, thus leaving the Board to divert its funds to the primary education of the race.

Your committee believes that the Board of Education is not able to maintain the negro High School and also extend the negro primary schools. The lack of funds forbids this, as we are confronted with the question of the best disposition of the money in hand. Having heard from the Principal of the school and other members of the colored race, and having carefully considered the question in all its bearings, your committee makes the following recommendations:

1st. That the High School for negro children known as the Ware High School be discontinued by this Board. This is not to be considered as a reflection upon the ability or faithfulness or character of the work done by the teachers in charge, but is for purely economic reasons in the education of the negro race.

2nd. That the City Conference Board be requested to open four primary schools in the same building at a cost of about $200 apiece for the accommodation of those negro children who are annually denied admittance to the schools.

Respectfully submitted,

JOS. GANAHL, Chairman, and others Committee.

These reports were duly made to the July meeting and upon full consideration were adopted.

At the same time when the vote was taken on the report on the Ware High School it was unanimously "resolved that the Board reinstate the said school whenever the Board could afford it."

Subsequently to the Boards' temporary suspension of the Ware High School, a number of colored people petitioned the Board for a recision of this action, among whom were the complainants herein. A full Board was called and convened on the [illegible]th day of August, 1897, and the petitioners were heard. Their petition and the reasons given, were

fully considered. The Board, after a session and deliberation of over two hours, refused to rescind.

GENERAL INFORMATION

CONCERNING THE PUBLIC SCHOOL SYSTEM OF RICHMOND COUNTY, FOR THE INSTRUCTION OF TEACHERS AND THE BENEFIT OF THE PUBLIC.

The Board of Education consists of thirty-six members, three from each of the five city wards, five country districts, two incorporated villages, and the Ordinary of the County, ex-officio. Members must be freeholders and residents of the county. The term of office is three years and an election occurs every November to fill the vacancies on the Board, the term of one-third of the members expiring annually. The Board meets regularly on the second Saturday in each month, and the President is chosen from among its members. The Secretary, who is also the County School Commissioner, is chosen annually at the meeting in January.

The schools in each district and village in the county are under the entire control of the local trustees. The teachers are chosen by them, the length of the term is regulated by them, and all matters pertaining to the schools are referred to them, under regulations of the Board of Education. In the city the schools are under the charge of the Conference Board of City Trustees, which consists of all the members from the five wards, of which the President is chairman.

The school fund at the disposal of the Board is annually divided according to the school population among the city wards, the five country districts and the two villages, after reserving a fund for the general expenses of the Board and for the High Schools. By this means each set of local trustees can see the amount at their disposal and can regulate their school accordingly. They have few or many teachers, a long or a short term, build and repair just as they please and as their funds permit.

Each district, village and the city wards run a separate set of schools, and yet the whole system is controlled by one Board of Education, and the actions of the various local trustees are under the supervision of suitable committees from the General Board.

The Secretary and County School Commissioner is in general charge of the whole. The teachers in the High Schools are chosen by the entire Board of Education. Those in the City Schools are chosen by the Conference Board of the City Trustees, which consists of the twelve members from the four wards. Those in the Country Districts are chosen by the Local Trustees in which the district is situated.

ARGUMENT.

The Board, on full consideration, in the exercise of its administrative powers, legislative and judicial, temporarily suspended the Ware High School. Because: 1st. There was no want of the people for the same

in view of the fact that three other High Schools were in full operation for the colored race. 2nd. There was need for primary schools for the colored race, and the same money and building which carried on tuition for sixty pupils in the High School was competent to conduct the teaching of 200 children in primary schools. 3d. The funds of the Board being insufficient at the present rate of taxation to conduct both, the Board discriminated between the blacks who asked for a High School and the blacks who asked for primary education. The former amounted to 60, the latter to 200.

The Board has not taken from their colored friends any benefit, nor denied them any protection, nor destroyed any quality that heretofore belonged to them.

This is the sin of the Board of Education—that it temporarily suspended a school which, in their judgment, the people did not need, to supply schools the people did need.

Is their action illegal and void for want of authority?

The injunction order enjoins the Board from conducting the Tubman High School, and giving assistance to the Hepzibah High School, by restraining and forbidding it from using any of their funds in support of these schools, until the Board shall establish a High School for the colored people.

POINTS.

I. The petition is without equity for injunction.

(a). It is not equity to destroy one thing to create another. If the complainants were deprived of a legal right to have a High School for their children, let that right be asserted and obtained. But to obtain it by depriving others of a like right is to remedy one wrong by the perpetration of another.

Because John's hat has been wrongly taken from him, does not justify John in demanding that Jim's hat be taken from him also.

This is not the language of equity, but of spite.

(b). The right to a High School for complainants' children is not a *clear* right. It is nowhere denied that in suspending the Ware High School the Board exercised a legislative power in good faith, and as it conceived for the benefit of the whole people. Nor is it denied that this act did enure to the public benefit, and to the substantial benefit of the colored race?

To pronounce this formal act done on full consideration by the Board in its legislative capacity (meeting of July), and its judicial capacity (meeting of August), as unconstitutional, or what is the same thing as unwarranted by the statute of 1872, will not be done, save in a case of undoubted usurpation or misapprehension.

Construction to be in favor constitutionality.

The repugnance must be beyond reasonable doubt.

Adams vs. Howe, 7 Am. D., 216 ; 25 Am. Dec., 677.

"It has become a maxim that a statute cannot be declared unconsti-
"tutional unless it is plainly shown to offend some specific provision or

"necessarily implied prohibition, and that to doubt is to sustain the "act."

Endlich, Sec. 525, p. 738.
Cooley, Cons. L., 208.
Cooley, Cons. L., 192, 222.

To same effect: Turman vs. Cargil & Daniel, 54 Ga., 663.

To declare the power of the legislature illegally exercised is a solemn matter and needs be weighed with careful consideration.

Gunn vs. Hendry, 43 Ga., 559.

Even if the law is against natural justice, the Court cannot pronounce it unconstitutional for this reason.

Macon & A. Railroad vs. Little, 45 Ga., 371, 388.

To same effect are decisions in U. S. Supreme Court.

"Whether the legislative department has transcended the limits of its "constitutional powers is at all times a question of much delicacy, which "ought seldom, if ever to be decided in the affirmative in a doubtful "case. * * * The opposition between the law should be such that "the Judge feels a clear and strong conviction of their incompatability "with each other."

Fletcher vs. Peck, 6 Cr., 128.

"Every possible presumption is in favor of the validity of the statute, "and this continues until the contrary is shown beyond a rational "doubt." * * *

"One branch of the government cannot encroach on the domain of another without danger.

"The safety of our institutions depends in no small degree on a strict observance of this salutory rule.

(Chief Justice Waite) Sinking Fund Cases, 99 U. S., 718.

(c) The right of complainant's children to a High School is not clear, because the terms of Section 9 of Act, 1872, refer to and apply to primary schools only, and do not apply to pay High Schools authorized to be conducted by the Board exclusively under Section 10 of Act, 1872, and amended by Acts of 1877.

The schools, primary and high, are of different grades and class. The 9th Section refers to trustee schools, such as in the 6th Section are referred to (last sentence in the Section) which declares: "The trus- "tees in each school district shall have exclusive authority to establish "such schools within their jurisdiction as in their judgment may be ex- "pedient."

The 9th Section provides that these schools are to be managed by the Board under the advice and assistance of the Trustees in each ward that the white and colored youth shall be taught in separate schools, and "the same facilities for each as regards school houses and fixtures, "attainments and abilities of teachers, length of term, time and all other "matters appertaining to education, but in no case shall white and "colored children be taught together in the same school."

The next Section 10th, refers to High Schools and by Act of 1877, Pay High Schools. They are called schools of Higher Grade, which the Board of Education *may* establish at such points in the county as the interests and convenience of the people may require. They are to

be under the special management of the Board at large, who . . ll have full power over them.

The schools referred to in Section 9, are not only of a different class and of lower grade from those spoken of in Section, 10th, but a different rule is given for their institution and conduct. The latter are to be established, not in each ward, village and district of the county, not for each race, but as the interests and convenience of the people may require.

It follows that the language in the 9th Section requiring equal facilities for each race and enumerating the duties imposed here has no application to Pay High Schools provided for in the 10th Section and the general language in the 9th Section, "all other matters pertaining to education" does not refer to Pay High Schools.

It is a rule of interpretation that general words closing an enumeration of particulars do not extend to particulars that are of higher grade and rank than any ot those contained in the enumeration.

Perkins vs. Perkins, 21 Ga., 16.

White vs. Ivey, 34 Ga., 199; Torrance vs. McDougal, 12 Ga., 526.

(d) The right is not clear, because the Board as a Court and governmental agency of this state, has decided from its earliest to organization, that it may establish High Schools in its discretion, guided only by the consideration of the public wants, and not on any other line. So it established a white High School for boys in the city of Augusta and then abolished it. It established a High School for white boys and girls in the village of Summerville and abolished it. It established Tubman High School for girls, because of the geeat want of such a school, and of the benefaction by Mrs. Tubman. It assisted the Hepzibah High School because of the large returns in the way of education. It established the Ware High School for colored boys and girls when there was a want for this school, and discriminated in favor of the race by charging $10 tuition instead of $15 per annum. It suspended the Ware School when it found three other High Schools for the race, with building, apparatus and endowment of $13,000 per annum, because in the judgment of the Board, the want which it supplied was filled by equal facilities from other sources, and at a less cost.

The construction of a statute by the officers who execute it ought to have the force of a judicial decision.

Bruce vs. Schuyler (Illinois, 1847), Am. Dec., Sec. 447.

In case cited the Court say:

"In the case of Boyden vs. Brookline, 8 Vt., 286, and Schaffer vs. "Bloomfield, Id., 478, the Court decided that a construction of a statute "by the officers to whom its execution is entrusted, ought to have the "force of judicial decision.

"It has also been decided that a contemporaneous is generally the "best construction of the law. It gives the sense of the community of "the terms made use of by the legislature. 17 Mass., 143; 2 Mass., 477.

"After the Judges of the Supreme Court of the United States had "held Circuit Courts for little more than half the period that this law "has been acquiesced in under the law of congress, they unanimously

"determined that it was too late to inquire into the law—that practice "and acquiesence under it for such a length of time had fixed its con- "struction.

"The present is a stronger one of contemporaneous construction, and "justifies a resort to the maxim—*Communis error facit jus.*"

46 Am. Dec., 450. The Court, speaking of a construction of a statute given it by the usage of conveyancers at the time of its passage says:

"It has for its support the usage of the skillful conveyancers contem- "poraneous with the statute, and this is a consideration of great force "and one that should control and in no case be departed from without "most cogent reasons."

Chestnut vs. Shore's Lepee, 16 Ohio, 47 Am. Dec., 390.

"Courts feel themselves constrained to uphold, where it is possible "contemporaneous interpretation of statutes."

In re will of Warfield, 22 Cal., 51; 83 Am. Dec., 49-58. In construing statutes applicable to public corporations, Courts will attach no slight weight to the practice under them if this practice has continued for a considerable period of time.

French vs. Cowan (Me.), 4 New England R., 682-686, cited in Endlich, §357.

See Endlich, Ch. XIII., usage and contemporaneous construction of statutes, §357, §363.

(e) There is no injury done to complainants. . The bill does not aver or the evidence show that complainants' children would not receive equal facilities of education at the other High Schools in the city of Augusta, and for a less sum of tuition money and at school houses equally accessible.

The only excuse here is that these schools are sectarian. They do not show that they teach Presbyterian Latin, Methodist Geometry or Baptist Rhetoric. There is no creed, says Bacon, in learning and science.

The Court says, they should not count because they are independent of the Board. They are not independent, they are allies in the great cause for which the Board was instituted.

(f) Injunction will not issue when it does more harm to others than it will do good to the complainants.

The white youth have done complainants no harm. They at least are innocent of wrong; yet the Court would, in the midst of their studies, shuts up their schools and leaves them without shelter. They have not, as complainants' children have, other schools of like grade and less cost to receive them within their fold.

If it be a sin to have abolished the Ware High School, to abolish the white school would be an outrage.

(g) Complainants do not represent a class, much less the race to which they belong. They represent their special injuries only.

"Injunction is applicable only to special injuries in violation of pri-
"vate right. Individuals are not authorized to redress public griev-
"ances at their own suit."

Del. & Md. R. R. Co., vs. Stump, 8 Gill & Johnson, 479; S. C., 29 Am. Dec., 561.

This seems to be the radical error which beset the Court. He argues all the time as if the colored people were before him as a class aggrieved. The complainants are not even in sympathy with a large majority of their race. These comprise the great number who are too poor to afford a High School, and the great number who prefer the High Schools of Lucy Lane, of Haines Institute, and the Walker Baptist.

(h) The small set in sympathy with the complainants do not represent the race, but misapprehend their wants as a people.

The Board, planted by the legislature, and elected by the people from year to year, represent the people—people of all grades and classes, conditions, color and sex.

If their conduct in this behalf is in good faith and without fraud, it cannot be impeached.

(i) Complainants rights have not been infringed by suspension of the Ware High School.

The purpose of education by taxation is the prevention of crime and the amelioration of the human race. On no other theory can taxation for this purpose be defended.

The educational tax fund is used best when it is used for the widest and most thorough dissemination of education.

The private benefit which an individual may receive from this fund (as from any other fund raised by taxation), is incidental. The objective point is the general improvement of the state by the education of its children.

Every individual has an interest in the distribution of this fund. But it is a public and not a private interest. That is, a right to see that the fund is used for the best interests of education, not a right necessarily to participate in the direct benefits incidental to such use.

Many taxpayers (possibly a majority of them), can receive no direct benefit; either because they have no children of school age or for any other reason.

It follows from this that the action of the Board in abandoning a field of education already amply and satisfactorily covered by institutions, and confining their efforts to those fields which are otherwise insufficiently covered, thus securing the widest and most thorough dissemination of knowledge possible with the means at hand, have not infringed the rights of anyone.

II. THE FOURTEENTH AMENDMENT.

(a). The action of the Board is not unconstitutional as running counter to that clause of XIV Amendment which forbids a state, "to deny to any person within its jurisdiction the equal protection of the laws."

There is nothing new in this provision. It is old as "Magna-Charta." As Macauley beautifully says: "This great charter of human rights embodied principles so great and potent, that their evolution through many ages has brought about the state of things under which we now prosper; where no man is above the majesty, and no man below the equal protection of the law. It is expressed in the constitution of every free state in emphatic terms."

"Protection," says the Constitution of our State, "to person and property is the paramount duty of every government, and it shall be impartial and complete. Code, §5699.

And again it is reiterated, in the forbidding of class legislation. Code, Sections 5732, 5715.

The Supreme Court of the United States has conservatively construed this clause of the Fourteenth Amendment. It means only that certain children of the state must not be discriminated against on *account* of color, race or previous condition of servitude. If the rule that excludes be other than the color line—be conditions and limitations applicable alike to both races—the amendment does not apply.

The acts forbidden are those of discriminations against the negro on account of race and color only—discrimination against the negro, because he is a negro.

Slaughter Houuse Cases, 16 How., 36.
Strauder Case, 100 U. S., 303.
Virginia vs. Rives, 100 U. S., 313.
Ex parte Virginia, 100 U. S., 339.
Neal vs. Delaware, 103 U. S., 370.
Bush vs. Kentucky, 107 U. S., 110.
Yick Ho vs. Hopkins, 118 U. S., 356.
Gibson vs. Mississippi, 162 U. S., 565.
Plessy vs. Ferguson, 163 U. S., 537.

In the case of the *State ex rel. Clark vs. Maryland Inst. for Promotion of Mechanic Arts*, decided by the Court of Appleals of Maryland, June 28, 1898, reported in 41st Atlantic Reporter, 126, being a Mandamus to compel admission into a private school established by the State of a colored pupil, averring the refusal to be a violation of the 14th amendment to the Constitution of the United States, the Court refused to sanction the writ, stating in his opinion, page 129, as follows:

"Enlightened legislation is not enacted on the narrow-minded principle that a benefit conferred on one object is necessarily something unjustly withheld from another. Let us suppose, for the sake of illustration, that there was a school of great merit, conducted exclusively for the instruction of colored pupils in branches of learning not taught in the public schools, and that the legislature saw fit to appropriate

money for the tuition of a number of colored pupils. It is not probable that such action would be assailed as forbidden by the Fourteenth Amendment, because of an unjust discrimination against the whites. But it cannot be doubted that the legislature has ample power to make appropriations to special objects, whenever in its judgment, the public good would be thereby promoted. It has constantly exercised this power from the beginning of the state government. The legislature may make donations without regard to class, creed, color or previous condition of servitude. The only condition limiting this exercise of this power is that it must in some way promote the the public interest. The state has never surrendered this power to the general government, and never can surrender it without stripping itself of the means of providing for the good order, happiness, and general welfare of society. The benefits conferred in this way are matters of grace and favor which the state bestows on its own citizens for worthy public reasons. They certainly cannot properly be described, in the language of the Fourteenth Amendment, as "privileges or immunities of citizens of the United States." If they were such they could be demanded by any citizen of the United States, whether resident in Maryland or Oregon. And in that event, and only in that event, they would be comprehended within the scope of the Fourteenth Amendment. Slaughter House Case, 16 Wall, 36. It is needless to say that the legislature is not limited by the state constitution in the particular mentioned."

(b). LEGISLATIVE CONSTRUCTION OF FOURTEENTH AMENDMENT—DISCRIMINATION ON ACCOUNT OF COLOR A CRIME.

"Every person who under color of any law, statute, ordinance, regu-"lation or custom, subjects or causes to be subjected any inhabitant of "any state or territory, to the deprivation of any rights, privileges or "immunities secured or protected by the Constitution of the United "States." * * * On account of such inhabitant being an alien, or by reason of his color or race shall be punished by fine of not more than $1,000, or by imprisonment not more than one year, or by both.

Act 31st May, 1870.

Rev. Statutes, §5570.

Apply to this Board of Education the terms of this statute :

1. It has deprived the complainants of a right to a High School.

2. This deprivation is on account of complainants' race and color.

3. This deprivation is made under a rule and regulation, which is a mere color, cover and pretence to the true design.

This statute was intended to secure the colored race the full benefit of the Fourteenth Amendment, and to assure them of the equal protection of the laws. It was written by Mr. Sumner, with the amendments before him, and was designed to meet its demands.

The provisions are a test of whether the amendment has been disobeyed.

It follows if the amendment has been disobeyed by the Board in its action touching the Ware High School, the misdemeanor may be punished on the criminal side of the Court, but a Court of Equity has no place in the premises.

III. GOVERNMENT BY INJUNCTION.

Even in a clear and imperative case, the Court might pronounce the action of the Board in suspending the Ware High School as beyond the powers given to it by the organic act of 1872, it does not follow that the Court may remedy the wrong, by suspending other High Schools established by the Board. The right to establish, dissolve and suspend High Schools is given by the legislature to this Board, and to no other person, least of all to a judicial officer, since this is a legislative act. Therefore, when the Court undertakes to suspend a High School, duly established it becomes a clear case of judicial legislation, and when this honorable judicatory attempts to enforce this legislation, by process of injunction, we have a fresh case of that modern anomaly. "Government by Injunction."

And worse, what is this but converting a beneficient instrument of preventive justice—the peculiar property of a tribunal founded on conscience and conservatism, and justly proud of the title of equity—into an engine of punishment?

Torture by injunction is substituted for the rack and thumbscrew of inquisition. The fairest temple of our law is transformed into a penal court, where sentence is pronounced without jury, and methods obtain which recall the Star Chamber of the Stuarts.

This is not the language of exaggeration.

The case remains open "until the further order of the Court," until, that is, the Court shall have established a high school for negroes, which is in his judgment of equal facilities with the white school.

A Court of Equity has taken control of a political government of public officers and administers their exclusive duties.

The Court has treated the powers and functions of a legislature as so much property. It seizes and administers them as it would seize and administer an estate for the benefit of creditors.

The complainants, Cumming, et al., have an interest and vested right in this property and the concern is held up in order to secure their claim.

The assumption of one department powers belonging to another, all history and experience shows is inconsistant with free institutions. It is the feature then distinguishes personal government from government by law.

If the complainants have rights they are not to be obtained by recourse to despotism.

Let us pursue this thought to its logical conclusions:

Should the case go back to the Superior Court by a mandate from this Court, the Board will apply, say, for time to enable it to establish the school for complainant's children. It will be necessary to borrow

the money, provide a building, appoint teachers and effect other details for the new institution. The Court will in good conscience grant a reasonable delay. When the Board shall report that it has obeyed the order of the Court, its repert wiil in due course be examined and inquiry made if the new school be of equal educational facilities, to that of the Tubman High School; and the complainants be heard to show cause why the defendant be not discharged; complainants for cause shows that the new school is not equal to the Tubman School in many particulars; that the building is not as good, that French is not taught therein, that the teachers are not as numerous nor as competent. Thereupon the Court will order these discrepancies to be remedied. When finally this shall be accomplished, and the Court is satisfied that the school for Cumming, et al, has been made of equal facilities with the Tubman, the case is concluded and Board asks for discharge.

But as the Board has heretofore, in the exercise of its discretion, suspended the Ware High School, and so soon as discharged hence, may do the same thing with the Cumming school, it is but equitable to the complainants that by the decree of the Court they be protected from this wrong. Whereupon an order issues that the Board be enjoined from abolishing or suspending or in any wise altering the equal facilities quality of the Cumming school, and be discharged hence with costs.

With this halter round its neck the Board is discharged, subject to be brought up for disobedience of the Court's order whenever in complainants judgment the equal facilities of the new school quality shall be impaired.

To this complexion do we reach when a Court assumes to take charge of and administer the functions of a public and political corporation, as it would a money fund for the benefit of creditors, and govern the people by the process of injunction.

MOTION TO DISMISS.

The judgment of the Supreme Court of Georgia here to be reviewed is in the following language:

"This case came before this Court upon a writ of error from the "Superior Court of Richmond County, and after argument heard it, "is considered and adjudged that the judgment of the Court below be "reversed, because the Court erred in granting an injunction, all the "justices concurring."

Printed Record 39.

The judgment of the Superior Court of Richmond County on the remitter from the Supreme Court is as follows:

"The remitter from the Supreme Court, reversing the judgment of "this Court, because the Court erred in granting an injunction, it is "ordered:"

"1. That the same be entered on the minutes of this Court, and the "judgment of the Court be reversed on the ground stated."

"2. That the plaintiffs in the case be and they are hereby refused all the relief prayed for, and the petition dismissed at their costs."

Printed Record 38–39.

The judgment denying and refusing the writ of injunction to the complainants rests essentially on ten grounds, each of them broad enough to support the same without reference to the 14th Amendment or other Federal questions. There are;

That the right of injunction is not shown. Because

1. It is not equity to destroy one thing in order to create another.
2. The right of injunction is not clear nor the case urgent.

Code of Georgia, §4902.

3. Under Section 10 of Act 1872 as amended by Act of 1877, the Board may establish pay high schools in the county *as the interest and convenience of the people* may require, and it is nowhere shown that the interest and convenience of the people was in any way counter to their action.

4. The Board has always exercised the right to establish and abolish high schools for pay in the county independently of any other consideration than that of the interest and convenience of the whole people, and this action and construction of their powers and duties has been of 25 years duration, and has the force of a judicial decision.

5. No injury has been done to complainants. Other schools of high grade being open to their children with equal facilities of education, for less tuition money, and of equal acceptability.

6. Injunction will do harm to others, while of no benefit to complainants.

7. Complainants have no right to represent a class nor the race to which they belong.

8. Complainants do not represent the wants or interests of their race. These interests are represented by the Board.

9. No rights of the complainants have been infringed, since the action of the board in suspending one field of education amply covered by other institutions and confining their efforts to those fields insufficiently covered, and thus securing the widest and most thorough dissemination of knowledge possible with their means at hand, have not infringed the rights of any one.

10. A Court has no power in equity to enjoin a pay high school established by the Board. To do so would be to usurp legislative powers and institute a despotism.

If the judgment refusing injunction *could* have been rendered outside of and independently of a Federal question, this Court will decline jurisdiction, and dismisses the writ of error.

Eustis vs. Bolles, 150 U. S., 362.

Affirmed in Harrison vs. Morton, 171 U. S., 38.

All the assignments of error are defective and demurrable for insufficiency.

The thing forbidden by the provisions of the 14th Amendment is discrimination against the negro race, *on account* of his color and race or previous condition of servitude.

If discrimination have arisen on any other line of cause or reason than the line of color and race the amendment has no application.

It follows that the assignments shall not only aver differences but must aver them to be discriminations by the white race in favor of the white race, and against the colored race, because of the latters color and race and not because of any other cause and reason.

We proceed to the assignments severally.

First Assignment—"That the statute of the State of Georgia giv-"ing a discretion to the County Board of Education to establish and "maintain higher schools for white persons and to discontinue and "refuse to maintain higher schools for persons of the negro race was "and is contrary to the Constitution of the United States, and espec-"ially to the 14th Amendment thereof."—Answer. The record shows the existence of no such statute. The act of 1872 as amended by act of 1877, does not give any such discretion. The power of the board, and its discretion was limited to the establishing such pay high schools as the interest and convenience of the people might require.

Second Assignment—"The Court decided and held that the Con-"stitution of the United States was not violated by the action of the "said board in establishing and maintaining high schools for the edu-"cation of white persons and in refusing to establish and maintain "high schools for the education of persons of the negro race." The record shows no such decision or finding. What the Court did decide and find was that the board might without violating the Constitution of the United States in the exercise of its discretion suspend a pay high school for persons of the negro race, when there were three other high schools in full operation for the colored race in the community; when there was need for primary schools for persons of the colored race and the same money and building which carried on the tuition of sixty pupils in the pay high school was competent to conduct the teaching of 200 children in the primary schools; and when the funds of the Board were insufficient to maintain both.

Third Assignment—"In deciding and holding that persons of the "negro race could consistently with the Constitution of the United "States be, by the laws of Georgia, taxed and the money derived from "their taxation be appropriated to the establishment and maintenance

"of high schools for white persons, while pursuant to the same law "the said Board refused to establish and maintain high schools for the "education of the negro race."

The error in this assignment lies in the fact, that taxation is a mere incident of the right of the Board in its discretion to suspend one of its high schools when the interest and convenience of the people do not require it.

If the Ware High Lchool could be suspended without a violation of the 14th Amendment, it is clear that any change in the disposition of the taxes consequent thereon is no violation of the amendment.

But the record shows that there has been no change in the taxation of the negro, arising from the suspension of the Ware High School. The same moneys that supported the Ware High School for colored persons, has been appropriated to the support of primary schools for the colored people.

Fourth Assignment—This is an *omnibus* clause, and we suppose not seriously delivered by the distinguished counsel for the plaintiff in error.

No. 164.
Sup. Br. of Miller for D.

Filed Oct. 26, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 164.

J. W. CUMMING, JAS. S. HARPER, AND JOHN C. LADEVEZE, PLAINTIFFS IN ERROR,

vs.

THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, STATE OF GEORGIA.

IN ERROR TO THE SUPERIOR COURT OF RICHMOND COUNTY, STATE OF GEORGIA.

SUPPLEMENTARY BRIEF OF FRANK H. MILLER FOR THE DEFENDANT IN ERROR.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-26-'99

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 164.

CUMMING, HARPER, AND LADEVEZE, PLAINTIFFS IN ERROR,

vs.

THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, STATE OF GEORGIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPERIOR COURT OF RICHMOND COUNTY, GEORGIA.

SUPPLEMENTARY BRIEF OF FRANK H. MILLER FOR DEFENDANT IN ERROR.

The brief of counsel for plaintiffs in error was filed after that of the defendant in error, and this is intended to call attention of the court to errors in the plaintiffs' brief.

First. This brief states, point 5, page 16: "In respect of "the contention stated in the brief of the other side that

" Bohler, the tax collector, should have been made a party " to this writ of error, it is sufficient to say that the petition " as to him was dismissed by the superior court at the hear- " ing (Record, p. 38), and that no appeal was taken by the " petitioners."

This contention is not an "imaginary technicality." The facts are that Bohler, the tax collector, was the person sought to be enjoined from collecting the tax levied for the support of high schools (Record, p. 4). The court sustained his demurrer as cause shown against the rule (Record, p. 7), but immediately upon rendering its decision, and at the same time the same was actually filed, December 22, 1897, by order, the court suspended this decision until a decision by the supreme court should be rendered upon the bill of exceptions to be sued out by the board of education. The case therefore stood suspended in every particular without further action until decided by the supreme court, when it was dismissed in conformity to its opinion and upon the receipt of its mandate (Record, pp. 38 and 39).

The case which was so suspended in the superior court would not have been heard by the supreme court of Georgia unless the tax collector had been made a party, and he was so made (Supplemental Record, p. 32). (See Inman Smith & Co. *vs.* Estes, 104 Ga. Reports, 645; White *et al. vs.* Bleckley *et al.*, 105 Ga. Reports, 173.)

It therefore appears that Bohler was a party to the proceeding until the final termination of the suspension by the order dismissing the entire cause (Record, pp. 38 and 39). The plaintiffs in error have elected in suing out the writ of error to the superior court of the county to omit the tax collector, which deprives this court from rendering any de-

cision that would have any effect upon the question of taxation raised in the record, it being noted, however, that there was filed in the superior court the assignments of error, with a copy of the decision of the supreme court of the State of Georgia (Record, pp. 40 and 59).

Again, there is really no constitutional question before this court, because none has really been decided adversely to the plaintiffs in error. When they filed their petition they relied on a violation of the fourteenth amendment. The superior court decided in their favor, ignoring the constitutional question and putting its decision entirely upon the construction of the State statute. From this decision the board of education sued out a writ of error to the supreme court of the State as to what was decided adversely to it, and the decision of the court below was reversed by the supreme court mainly upon the construction of the State statute, no argument being presented to the court by the plaintiffs in error asserting specifically a right under the fourteenth amendment. The plaintiffs in error never sued out any cross-bill of exceptions to the refusal to decide their case for them upon the constitutional grounds, but were satisfied with accepting the decision of the superior court upon the construction of the State statute. This construction having been reversed by the supreme court, the State superior court obeyed the reversal, and dismissed the petition in equity.

In this connection it will be noted that the supreme court of Georgia in their opinion (Printed Record, p. 53, copied in Defendant's Original Brief, p. 3), speaking of the claim of the petitioners that the action of the defendant was contrary to the fourteenth amendment, say :

"This point in the case was not argued before us by the learned counsel for the plaintiffs in error, either orally or by brief."

It is therefore insisted that the constitutional questions raised were never specifically passed on by the superior court, to which the writ of error in this case from this court was taken, and were practically waived and abandoned in the supreme court of Georgia.

Second. The learned counsel for the plaintiffs in error, undertaking to comply with rule 21, section 2, paragraph 3, and annex the statutes of the State cited, prints the provisions of the constitution of 1877. The board of education came into existence under the constitution of 1868 and the legislative acts passed pursuant thereto, all of which were of force and operative prior to the constitution of 1877, and held constitutional by the supreme court of Georgia in 72 Georgia Reports, 546. Therefore the provision of the constitution of 1877, annexed to the brief of the plaintiffs in error, has no application whatsoever, unless it may be the fifth section of paragraph 18, which ordains that existing local school systems shall not be affected. The sections of the constitution of 1868 upon which the defendant in error relies are set out in the original brief of the defendant in error, page 4, and these provide, as a constitutional right, only for a general system of education, under which alone have plaintiffs any right to be heard.

Respectfully submitted.

FRANK H. MILLER,
Solicitor for Defendant in Error.